No. 18273

In the United States Court of Appeals for the Ninth Circuit

HARVEY ALUMINUM (INCORPORATED), GENERAL ENGINEERING, INC., AND WALLACE A. UMMEL d/b/a WALLACE DETECTIVE AND SECURITY AGENCY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND ON CROSS-PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the joint and several petitions of Harvey Aluminum (Incorporated), General Engineering, Inc., and Wallace A. Ummel d/b/a Wallace Detective and Security Agency, to review and set aside an order of the National Labor Relations Board issued on October 18, 1962. In its answer, the Board has cross-petitioned for enforcement of its order. The Board's decision and order (R. 129–215)[1] are reported at 139 NLRB 151. This

[1] References designated "R" are to Volume I of the record reproduced pursuant to Rule 10 of this Court. References des-

Court has jurisdiction over the proceeding under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), the unfair labor practices having occurred at The Dalles, Oregon, and Torrance, California. Only General contests the Board's assertion of jurisdiction. This issue is discussed, *infra,* pp. 20–24.

COUNTERSTATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that Harvey and General (herein referred to jointly as "Harvey") violated Section 8(a)(1) of the Act by engaging Wallace to place labor spies among Harvey's employees in its plants at Torrance, California, and The Dalles, Oregon, in order to learn and report on the identity of those of its employees who favored union organization.[2] The subsidiary facts upon which this finding is based may be summarized as follows:

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ignated "Tr." are to the reporter's transcript of testimony. Whenever in a series of references a semicolon appears, those preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The Board also found that Harvey violated Section 8(a)(3) and (1) of the Act by discriminating with respect to the employment of Ballard Dillon and Lewis D. Rea (R. 132, 194–209). Subsequent to the filing of the petition to review and the cross-petition to enforce the Board's order, the parties entered into a stipulation eliminating this portion of the case from the proceedings before the Court, on the grounds that Harvey had performed all the steps required by the Board to remedy its conduct toward these two employees which the Board found to be illegal. This stipulation was approved by the Court on May 28, 1963.

A. The employment of Wallace by Harvey

On June 2, 1960, Frank V. Siemens, a salesman for Wallace, called upon Andrew Cronkrite, general manager of Harvey's plant in The Dalles, Oregon (R. 137; Tr. 1708, 3344). Siemens first attempted to sell Cronkrite the detective agency's uniformed guard service. When Cronkrite advised Siemens that Harvey's own guard service was functioning satisfactorily, Siemens then stated that Wallace did other types of work as well (R. 137; Tr. 492). Cronkrite pointed to the notation, "confidential investigations," on Siemens' business card and asked how confidential these investigations could be. Siemens replied, "Very confidential" (*ibid.*). After some further discussion, Cronkrite asked if Wallace had personnel trained to "conduct a very quiet investigation into prounion employees of the Harvey Aluminum plant; and if [Wallace] had adequate * * * trained personnel to handle such a job * * *. He was very concerned about union conditions there at The Dalles * * *. He said he wanted to ferret out the union bastards * * *. He was going to fire them" (R. 137; Tr. 493–494).

Cronkrite went on to explain that Wallace operatives could be hired by Harvey as production workers through normal hiring procedures, after which they would be in position to make reports on their observations (R. 13; Tr. 494). Siemens assured Cronkrite that Wallace had personnel equipped to carry on this work. Cronkrite then stated that if Wallace did a good job at The Dalles, it could receive an identical assignment for Harvey at its plant in Torrance, Cal-

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ifornia (R. 137; Tr. 493). The matter was left on the basis that they had a binding agreement if Cronkrite had a satisfactory conversation with Wallace A. Ummel, the proprietor of the detective agency, concerning price and availability of personnel (R. 137; Tr. 494).

After his meeting with Cronkrite, Siemens, accompanied by his wife and Gerald McCarthy, Ummel's lieutenant, reported to Ummel about this prospect (R. 142; Tr. 495–496, 498). They discussed ways in which they might place Wallace operatives in the plant, how the operatives could communicate the information they might acquire to Ummel and Cronkrite, and the various Wallace employees who might be suitable for such an assignment (R. 143; Tr. 497–498, 3350, 3354–3356). Within the next several days, Ummel and Cronkrite met and reached agreement on method and terms (R. 156; Tr. 43).

B. Labor espionage at The Dalles

Shortly after Harvey retained Wallace, Ummel approached Calvin Davis and asked if he was interested in working for Harvey at The Dalles (R. 148; Tr. 38). Ummel stated that Harvey was nonunion, that unions had been unsuccessful in organizing the concern, and that the job involved ascertaining the identities of prounion employees and reporting their names and badge numbers to Ummel or to Cronkrite (R. 148; Tr. 38). Davis accepted the proposition and was told that his job, as well as that of his companion, Darrel Wagner, was to "report any activities of tool theft and the prounion activity" (R. 148; Tr. 36).

On June 6, Ummel introduced Davis and Wagner to General Manager Cronkrite who instructed them to apply for work at Harvey through regular channels and, after hire, to listen for "prounion" discussions (R. 156; Tr. 43). He further told them that their sole purpose was to "ferret out all prounion men," and that they were to report these men to Cronkrite or Ummel, but preferably the latter, unless it was an emergency (R. 156; Tr. 44). Cronkrite also instructed them that, if discovered, they were to state that they had been employed for detecting "tool theft only" (*ibid.*). The next morning, Davis and Wagner applied for work at the Harvey employment office in The Dalles (R. 156; Tr. 45). They were hired as laborers on June 9 and assigned to different parts of the plant (R. 156; Tr. 45).

About two weeks later, Cronkrite asked Ummel to furnish two additional operatives (R. 156; Tr. 1820). Ummel promptly arranged for two of his employees then working as uniformed guards, Stanley Hahn and William Miller, to report to The Dalles (R. 156; Tr. 1822). They applied for work on June 22 and were hired in the same manner as Davis and Wagner (R. 156; Tr. 1821–1822).

All four operatives, following the instructions given them by Cronkrite and Ummel, detected and reported to Davis anyone who disclosed prounion sympathies (R. 156; Tr. 48–49). Davis would then meet with Ummel, or report to him by telephone, and transmit all the information about union activities which the undercover agents had learned (R. 156–157; Tr. 48,

50). Ummel forwarded to Cronkrite all information submitted to him by his operatives. As described, *infra,* Davis was transferred to the Harvey plant in Torrance, California, on July 26, 1960. Thereafter, the reports of the remaining operatives were given either directly to Ummel, or to Ummel's aide, Eugene McCarthy (R. 171, 158; Tr. 304–306).[3]

C. The spy system is extended from The Dalles to Harvey's plant in Torrance, California

As a result of conversations in the first part of July between Cronkrite and Albert Hinz, Harvey's Director of Industrial Relations, Harvey decided to have Wallace extend its espionage activities to the Harvey plant in Torrance, California (R. 172; Tr. 1911–1912). It was arranged between Hinz, Cronkrite and Ummel that two Wallace operatives would promptly proceed to the Torrance plant (R. 172; Tr. 1914–1916, 1918). Petitioners agreed that the undercover agents would report to Ummel in Portland by mail, or in emergencies, by telephone; that Ummel would then relay the information to Cronkrite at The Dalles; and that Cronkrite would use a Company tie-line to report this information to Hinz back in Torrance (R. 172; Tr. 1995, 2664–2665).

Cronkrite and Ummel, believing that Davis had been doing a good job at The Dalles, decided to select him to start up the California portion of the "investiga-

[3] Wagner worked until July 15, when he left voluntarily for other employment. Hahn, a college student, remained at The Dalles for "a little over 2 months" until he left to return to school. Miller worked until September 1, 1960, when Ummel returned him to uniformed guard service in Portland (R. 150).

tion" (R. 172; Tr. 1915, 2662). Accordingly, on July 21, Ummel met with Davis and instructed him to get a leave of absence from the plant in The Dalles, and report to the Harvey plant in Torrance along with Richard Moore, who was then working for Ummel as a uniformed guard in Portland (R. 172; Tr. 50, 1914–1915). Ummel told Davis that he and Moore should apply for work in the same manner as at The Dalles, and to carry on the same labor espionage assignment (R. 172; Tr. 50).

Davis and Moore applied for work at the Torrance plant on July 25, as instructed, and they were hired the next day (R. 173; Tr. 54–55, 373). In Torrance, as in The Dalles, all investigative reports were channelled through Davis. When Davis subsequently left Torrance, Moore transmitted all reports (R. 174; Tr. 58, 378–379). The men gave to Ummel names and badge numbers of all Harvey employees who voiced prounion opinions (R. 174–175; Tr. 377, 381–382).

On August 12, Lucier and Moles, two additional operatives who had been sent to Torrance, reported at the plant (R. 175; Tr. 56–57). They were joined by still another undercover agent, Madge Pesek, on August 22.

By the time Pesek arrived, Davis had gone back to The Dalles, having been warned by Ummel, Cronkrite and Hinz on August 16 that his role as an undercover agent had been discovered (R. 175; Tr. 60). Cronkrite arranged to have Davis get his old job back at The Dalles plant, but his reappearance aroused the suspicions of his co-workers there, and he left after one day (R. 175; Tr. 62–63).

Shortly thereafter, Ummel instructed Davis to return to Torrance—not to work at the Torrance plant, but to check on the operatives because some of them were not sending in reports (R. 176; Tr. 63, 65, 67). Davis arrived in Torrance during the Labor Day weekend and stayed there for a week. He sent Lucier and Moles back to Portland for nonproduction of reports, and had Ummel replace them with Tom Feazle and Ummel's brother, Ray Ummel (R. 176; G.C. Exh. 4). All of the operatives made reports to petitioners, via Moore, on the union sympathies of Harvey employees (R. 177; Tr. 378–379). Feazle stayed at the Torrance plant until September 29; Pesek and Ray Ummel left on September 30; and Moore left during the first week of October, when he resumed his duties as a uniformed guard for Wallace in Portland (R. 177–178; Tr. 385–386).

With Moore's departure from the Torrance plant, the only Wallace operative left in either of Harvey's plants was one Carl Stark, who was assigned by Ummel to The Dalles plant in September after all the other agents there had departed and the undercover work at the Torrance plant had been exposed (R. 177–178, 164, 156). He remained there until April 1, 1961, at which time he left of his own accord (R. 156). Unlike his predecessor agents, Stark reported exclusively about thefts of tools and supplies, and made no mention of union activities (R. 164; Wallace Ext. 3–17). Except for one possible reprimand, no action was ever taken by Harvey against any of the employees identified as thieves in Stark's reports (R. 168; Tr. 2645–2651, 2724–2725).

II. The Trial Examiner's procedural rulings

Since petitioners devote virtually their entire brief to the alleged prejudicial errors committed by the Trial Examiner and affirmed by the Board, we shall set forth in this section of the Statement the relevant portions of the unfair labor practice hearings out of which petitioners' complaints arise.

At the hearing on June 14, 1961, Calvin Davis testified that, prior to the hearing, he had given statements bearing on the subject matter of his testimony to agents of the Deparment of Labor and Federal Bureau of Investigation, as well as to agents of the Board (Tr. 113, 115).[4] Mr. Lubersky, one of petitioners' counsel, thereupon demanded that Mr. Henderson, counsel for the General Counsel, give him copies of the statements given by Davis to the Board, the Department of Labor and the FBI (Tr. 116). Pursuant to the proviso in Section 102.118 of

[4] In their brief, p. 48, petitioners assert that there is nothing in the record to show why these other agencies were interested in this case, thereby seeking to imply that they were merely helping the Board in preparing for this unfair labor practice hearing. The record shows, however, that counsel for petitioners were well aware that a complaint had been filed with the Department of Labor's Bureau of Labor-Management Reports alleging that Harvey had failed to report the money paid to Wallace for labor espionage, in violation of Section 203 of the Labor-Management Reporting and Disclosure Act (29 U.S.C. Sec. 433). See Tr. 114, 144. Since the violation of Section 203 is a criminal offense, and can also be remedied or prevented by a civil action brought by the Secretary of Labor (see Sections 209–210 of the LMRDA, 29 U.S.C. Secs. 439–440), it is readily apparent why the Departments of Labor and Justice were investigating.

the Board's Rules and Regulations, Series 8, as amended,[5] Henderson gave Lubersky copies of the two statements Davis had given Board agents. Henderson told Lubersky that the General Counsel did not have the statements Davis gave to the other federal agencies (Tr. 116, 128).

Lubersky then asked the Trial Examiner to put Henderson on the stand for "a sort of voir dire" on the statements given by Davis to Labor and the FBI; Lubersky claimed that he wanted sworn testimony on whether agents for the Board had copies or summaries of those statements, or had ever seen them (Tr. 117–118). However, when Henderson told Lubersky that under the Board's rules, he could not testify without permission of the General Counsel, Lubersky indicated that he knew that rule, but said: "* * * I think I should have an opportunity to put my questions, one right after the other on the record, and if he wants to say * * * 'I cannot answer,' that's fine, but I would like all my questions on the record" (Tr. 119). Thereupon, Henderson took the stand and, pursuant to Section 102.118 of the Board's rules, declined to answer a series of questions asked by counsel for Harvey, except that he repeated under oath the statement he had made before—i.e., that the General Counsel did not possess, or have under his control, any statement given to the FBI or Labor which came within the proviso to Section 102.118, or any copies or excerpts from such a statement (Tr. 120–130).[6]

[5] That section is reproduced at pp. 126–127 of petitioners' brief.

[6] Petitioners' allegation in its brief, p. 10, n. 9, that Henderson had not denied having the FBI and Labor statements in his possession, is incorrect.

When Lubersky had finished interrogating Henderson, he renewed his demand for the statements given Labor and the FBI, alleging that he "knew" that agents of the General Counsel had notes of those statements (Tr. 131). In the alternative, Lubersky moved that Davis' testimony be stricken (Tr. 132, 135). The Trial Examiner denied the motions (Tr. 135). Lubersky thereupon secured the issuance of *subpenas duces tecum* to Henderson, the Board's General Counsel, the Secretary of Labor, and the Attorney General, requiring each of them to produce (Tr. 136, 141, TX Exh. 1a, 1b and 1c):

> Statements or copies of statements taken from Calvin C. Davis, Richard W. Moore, Stanley R. Hahn and Gordon Bishop and notes, excerpts or summaries thereof and any summaries of oral statements or other records of interviews and writings with respect to any such oral statements made by any of the aforementioned to the extent that any such writing, memorandum or other document relates to the employment of any of the aforementioned individuals by Wallace A. Ummel or Wallace A. Ummel d/b/a Wallace Detective & Security Agency, or Harvey Aluminum (Incorporated), Harvey Aluminum of Oregon or General Engineering, Inc.[7]

The Trial Examiner examined Henderson as a witness to insure that everything which might be considered a "statement" had been produced, including notes or transcriptions of oral statements (Tr. 136–138). Henderson denied that he had "anything of

[7] In their brief, p. 12, petitioners erroneously state that the subpenas were issued on June 21. The correct date in June 14.

an unsigned nature * * * in the nature of a statement," but at the request of the Trial Examiner, agreed to search his files for memoranda of conversations with Davis, since they might "approximate a statement" (Tr. 138–143). The hearing recessed a few moments later, and the Trial Examiner again urged Henderson "to utilize the period * * * to go through his file and * * * instructing [him], if he has anything in his file which he feels corresponds to an affidavit, whether signed or not * * * [including] a recording of what the witness said * * * to bring it to [the Trial Examiner's] attention" (Tr. 147). After the recess, Henderson advised the Trial Examiner and petitioners that there was nothing in the file with respect to Davis which even came close to being a statement—or, in the words of Lubersky, "no reports, in other words, which purport to state in writing anything that Mr. Davis said to any representative of the Board" (Tr. 148).

Counsel for petitioners having accepted Henderson's word that he had produced everything which might even arguably be considered a "statement," the parties turned to the next witness, Stanley Hahn. On cross examination by Lubersky, it was ascertained that he had given a statement to the Board and a statement to the Department of Labor—none to the FBI (Tr. 323–324). The parties then stipulated that if Henderson were called to the stand, he would give the same answers regarding Hahn's statements as he had regarding Davis' (Tr. 330).[8] Henderson then gave

[8] Petitioners had not yet asked the General Counsel to give Henderson permission to testify.

Lubersky a copy of Hahn's statement to a Board agent and stated that he also had a "memorandum to file" concerning a conversation which Board Agent Stratton had had with Hahn, but which Hahn had never seen (Tr. 330–331). While contending that the memo was not a "statement" within the meaning of Section 102.118, Henderson nevertheless gave it to the Trial Examiner so that the latter might examine it *in camera* and rule whether all, or any part of it, was producible (Tr. 331–333).

The Trial Examiner's initial reaction was that while only "two two-word phrases" contained in the memo were producible under the *Jencks* line of cases,[9] they would be difficult to excise and therefore, he would "resolve the doubt in favor of [petitioners] and let them see it" (Tr. 333). Having thus won this favorable ruling from the Trial Examiner, Lubersky did not immediately accept the memorandum, but suggested that the Trial Examiner first compare the memorandum with Hahn's affidavit "to see if there is anything in here that goes beyond what's already in the affidavit" (Tr. 333–334). Counsel for the other parties agreed to this suggestion (*ibid.*). After comparing the two documents, the Trial Examiner observed that the memorandum did not "give Mr. Lubersky anything that he doesn't already have" in the affidavit. The Trial Examiner nonetheless stated he would give the memorandum to petitioners, but then reserved his ruling so that he could think about it overnight (Tr. 334–335). The Trial Examiner ob-

[9] *Jencks* v. *U.S.*, 353 U.S. 657.

served that only about 10 percent of the document—two purported quotes of Hahn—were producible; the rest were Mr. Stratton's opinions (Tr. 334–344).

The next day, June 15, the Trial Examiner ruled that he would not compel Henderson to produce the memorandum relying on the *Palermo*[10] and first *Campbell*[11] decisions (Tr. 348–350).

When Hahn's cross-examination was concluded, the next witness called was Richard Moore. On cross-examination by Lubersky, it was established that he had given one statement each to Labor and the Board (Tr. 398–399). Lubersky thereupon demanded that Henderson produce all statements, notes of statements, and summaries thereof which were in the possession of Labor and the Board (Tr. 400–401). Henderson gave Lubersky a copy of the statement Moore gave the Board, and said, "Other than that, * * * we do not have any copies of affidavits given by Moore to any other Government agency. * * *" There is one memorandum in the file which is a memorandum of a conversation made by Mr. Stratton * * *, but my position on that is the same as on the affidavit of Mr. Hahn (N. 401).[12]

Upon further interrogation by counsel for petitioners, Moore said that he had spoken to Board agents Henderson and Stratton before, and that he believed

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[10] *Palermo* v. *U.S.*, 360 U.S. 343.

[11] *Campbell* v. *U.S.*, 365 U.S. 85.

[12] It is clear from the context that by the phrase, "affidavit of Mr. Hahn," Henderson really meant the Hahn memorandum. Petitioners do not contend that the Moore memorandum is producible.

that Henderson had taken notes of the conversation (Tr. 402–404). Lubersky demanded these notes, and Henderson denied having anything like that. He offered to make an explanation for the record, but counsel for petitioners, rather than accepting Henderson's offer to testify, moved that Moore's testimony be stricken because Moore had testified that notes had been taken and counsel for the General Counsel was "bound by" Moore's testimony that such notes did exist (Tr. 405–406). Upon examination by the Trial Examiner, Henderson specifically denied under oath that he took any notes when talking to Moore before the hearing, and explained how Moore might have become confused in that regard (Tr. 407–409). The parties then stipulated that the questions asked of Henderson regarding Davis' statements, and his answers thereto, would be the same regarding Moore (Tr. 411–413).[13] Petitioners' motion to strike Moore's testimony was denied.

Upon the conclusion of Moore's testimony on June 15, the hearings were recessed until July 10 (Tr. 519–521). The next day, June 16, petitioners finally sent a telegram to the Board asking that permission be granted to Henderson and Stratton to testify about the statements of Davis, Hahn and Moore (Tr. 531–532). On June 22, the General Counsel replied denying their request (Tr. 532–533).

On June 26, petitions to revoke the subpenas secured by petitioners on June 14 were filed by Henderson on

[13] Petitioners still had not applied to the General Counsel for permission for Henderson to testify.

behalf of the General Counsel, the Secretary of Labor, and the Attorney General (TX Exh. 2a, 2b and 2c). On July 12, the Trial Examiner granted the petitions and revoked the subpenas (Tr. 979–1004). Thereafter, on July 25, Henderson stated that the Board's files nowhere contain any statements, or copies thereof, which would be subject to production under the Board's rules other than those already made available to petitioners. He also assured petitioners that no statements had been destroyed or given back to another agency. When petitioners' counsel sought to ask more questions about the contents of the Board's files and the Board's investigation of the case, Henderson declined to answer pursuant to Section 102.118 of the Board's rules (Tr. 1015–1019).

III. The Board's conclusions and order

On the basis of the foregoing facts, the Board concluded, in agreement with the Trial Examiner, that by the employment of undercover operatives to engage in labor espionage and surveillance of union activities, petitioners thereby interfered with, restrained and coerced Harvey employees in the excise of their Section 7 rights in violation of Section 8(a)(1) of the Act (R. 131–132). In reaching this conclusion, the Board rejected petitioners' contention that the Wallace operatives were empoyed to detect only theft and the disposition of stolen goods, prostitution, dope peddling, gambling, and the unauthorized sale of liquor. The Board also rejected petitioners' claim that the Trial Examiner had erroneously refused to strike the testimony of General Counsel's

witnesses Davis, Hahn and Moore because petitioners were denied the witnesses' statements and related documents in the possession of the General Counsel and other federal agencies. The Board held that counsel for the General Counsel had given to petitioners copies of all the witnesses' statements in his possession, and that petitioners were not entitled to anything else upon demand as a matter of right (R. 129–130).

The Board's order required Harvey to cease and desist from the unfair labor practices found, and from in any other manner interfering with its employees' Section 7 rights. The Board ordered Wallace to cease and desist from engaging in union espionage for Harvey, or any other employer. Affirmatively, the Board's order requires petitioners to post appropriate notices (R. 131–132).

SUMMARY OF ARGUMENT

I

The Board properly asserted jurisdiction over General. On the basis of the facts found in earlier Board decisions, it is clear that Harvey and General constitute a single employer for the purposes of the Act. The Board could properly take official notice of those earlier decisions. Full opportunity was afforded to General to show a change in circumstances or to otherwise adduce new evidence, but General declined to do so. It cannot now complain, therefore, that the Board's action constituted prejudicial error.

II

Substantial evidence on the record considered as a whole supports the Board's finding that petitioners violated Section 8(a)(1) of the Act by engaging in labor espionage. This is so even if the testimony of Davis, Hahn and Moore be excluded. The credible testimony of Mr. and Mrs. Siemens as to the events leading up to the hiring of Wallace by Harvey, plus the inherently improbable testimony of Harvey's general manager, are sufficient by themselves to support the Board's findings of fact.

III

1. The Board produced for petitioners' inspection and use all statements of Davis, Hahn and Moore within its possession and control. The record clearly demonstrates that the Board never obtained statements from other federal agencies in the investigation or preparation of this case or that such statements had been used or seen. Counsel for the General Counsel never admitted having additional statements producible under *Jencks* or Section 102.118 of the Board's rules.

2. Petitioners received all the statements of witnesses to which they were entitled as a matter of right for impeachment purposes under Section 102.118. Petitioners were not entitled under *Jencks* to statements obtained by other federal agencies which the Board had never possessed, used or seen. Section

102.118 of the Board's rules, which defines the circumstances under which statements will be produced, is valid and proper. That rule, not the *Jencks* decision, is controlling in Board proceedings.

3. Section 11(1) of the Act does not deny to the Trial Examiner and the Board the power to revoke Board subpenas for any legally sufficient reason other than the two mentioned in the text of the Act. The Trial Examiner properly revoked the subpenas issued at the request of petitioners directed to the General Counsel, the Attorney General and the Secretary of Labor. Since petitioners could not obtain the material in question directly by demand under *Jencks,* they could not get it indirectly by means of subpena. In the absence of a showing of need independent of the alleged right to see if the material might be useful for impeachment purposes, the material subpenaed was privileged against disclosure.

4. The Board did not commit prejudicial error by declining to produce the Hahn memorandum for petitioners' inspection and use. The memorandum was not a "statement" as defined by the Board, Congress or the Supreme Court.

IV

Petitioners had no "right" to take the deposition of Lee Caldwell. It was within the Trial Examiner's discretion to permit or deny petitioners' request; his denial thereof did not constitute an abuse of discretion.

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ARGUMENT

I. The Board properly asserted jurisdiction over General, having found that Harvey and General constitute a single employer within the meaning of the Act

There is no question before this Court of the Board's assertion of jurisdiction over Harvey and Wallace. As to General, the Board, in agreement with the Trial Examiner, found that General and Harvey constitute a single employer (R. 131, 135) and therefore, that General's operations—being Harvey's operations—affect commerce within the meaning of the Act (R. 135). We show below that the Board properly found that Harvey and General constitute a single employer and that General's contentions to the contrary, discussed in its separate brief, are without merit.

At the hearing, upon request of General Counsel, the Trial Examiner agreed to notice officially four prior reported Board cases holding that Harvey and General are a single employer under the Act (R. 135; Tr. 1405). These cases, all involving General and Harvey, are reported at 123 NLRB 586, 125 NLRB 674, 131 NLRB 648 and 131 NLRB 901. The Trial Examiner's action in taking official or judicial notice of the Board's own cases is in accordance with the Board's practice (see *Avco Manufacturing Corp.,* 107 NLRB 295; *Aabel Corp.,* 111 NLRB 180, 181) which this Court has held to be proper. *N.L.R.B.* v. *Townsend,* 185 F. 2d 378, 381 (C.A. 9), cert. denied, 341 U.S. 909. Accord: *N.L.R.B.* v. *Reed and Prince Mfg. Co.,* 205 F. 2d 131, 139–140 (C.A. 1) cert. denied, 346 U.S. 887; *Paramount Cap Mfg. Co.* v. *N.L.R.B.,* 206 F.

2d 109, 113–114 (C.A. 8); *N.L.R.B.* v. *Ozark Dam Constructors,* 203 F. 2d 139, 146–147 (C.A. 8).

In 123 NLRB 586, the Board found that General was organized by three attorneys at the request of Lawrence Harvey, executive vice president of Harvey. The day after its certificate of incorporation was filed, it commenced work for Harvey under a contract negotiated by the same Lawrence Harvey. The attorneys who formed General were its sole stockholders, officers and directors. One of the attorneys testified before the Board in that case that he was under a moral obligation to dispose of his stock in General pursuant to directions from "the Harvey interests." Moreover, the Board found in that case that Harvey employees reviewed General's accounting and purchasing functions and initial wage rates paid by General; that General's general manager and personnel manager were recommended for their jobs by Lawrence Harvey and that the personnel manager was a former Harvey employee who continued to perform services for Harvey; and that posted rules and schedules at General appeared on Harvey stationery. Finally, the Board found that, *inter alia,* Harvey owned the plant and the bulk of the equipment, co-signed payroll checks, reimbursed General for its costs, including labor costs, and had been General's sole source of income. On the basis of the foregoing, the Board found General and Harvey to be a single employer.

In 125 NLRB 674, the Board found that Harvey and General constituted a single employer relying on the evidence of common ownership and control ad-

duced in 123 NLRB 586, described immediately above, plus the additional evidence adduced in 125 NLRB that General was organized, as described above, for the purpose of erecting an aluminum plant in Oregon for Harvey with the understanding that when the plant was built it would be surrendered to Harvey for operation. Further, in the construction of the plant, a corps of Harvey's key employees were on the construction site to insure that the operations of General were in the best interest of Harvey.

In 131 NLRB 648, 656, the Board noted that the complaint therein alleged, and the answer of Harvey and General admitted, that both Harvey and General built the plant at The Dalles, Oregon and "both corporations are and have been 'at all material times' engaged in the business of * * * operating the plant; and in interstate commerce within the meaning of the Act." Moreover, in that case the Board found that the evidence established, beyond cavil, that the labor relations policies affecting General's production employees are prescribed and applied by Harvey's managerial representatives (131 NLRB 648, 657).

Finally, in 131 NLRB 901, 904 the Board took official notice of the jurisdictional facts in the earlier cases described above and therefore found it unnecessary to rely on the Trial Examiner's finding therein that Harvey and General acted in concert.

In view of the foregoing, General's complaint in its brief (p. 7) that it is impossible for General to determine just what facts, "if any," were noticed, does not merit serious consideration. It is perfectly clear

from the record that the Trial Examiner and the Board took official notice of the above-described cases involving General and Harvey as "to the finding with respect to commerce and the business entities involved and the nature of the business entities" (Tr. 1422).

Likewise devoid of merit is General's contention (pp. 6–8) that it was denied an opportunity to refute the jurisdictional facts officially noticed, or show that at the time of the events in question, Harvey and General were not a single employer. The record shows the contrary to be the case. As the Trial Examiner stated, "Counsel for * * * General repeatedly refused, when so requested, to make any contention or claims that there had been any change in the business relationship between * * * Harvey and * * * General subsequent to the prior holdings on the subject" (R. 135; Tr. 1405–1413, 1416–1418). General's allegation in its brief (pp. 3, 4, 7), that after the issuance of the Intermediate Report it moved the Board for leave to refute the jurisdictional data officially reported, is unsupported in the record. Footnote 6 in the Board's decision and order (R. 131), upon which General relies, refers to a motion by Harvey, *not* General, "to reopen the record so that it could present evidence in refutation of findings, *other than jurisdictional findings,* contained in prior Board decisions involving * * * Harvey on the ground that the Trial Examiner had based his decision thereon" (emphasis added).[14] Thus, while presented with

[14] That particular allegation of error is not raised by petitioners in the proceeding before the Court.

many opportunities to do so, General has never sought to present evidence to the Board to prove that at the time of the events in question, General and Harvey were not a single employer. Indeed, General could have disputed the propriety of the Board's finding of single-employer status when it petitioned this Court to review the Board's decision and order in 131 NLRB 648 (summarized *supra,* p. 22), yet it did not do so. See *General Engineering, Inc. and Harvey Aluminum (Incorporated)* v. *N.L.R.B.,* 311 F. 2d 570.[15]

In sum, the Board properly took official notice of jurisdictional facts in its prior cases involving the same parties, and these facts amply support the Board's assertion of jurisdiction over General in the instant case. Moreover, General was afforded numerous opportunities to rebut the matter officially noticed, if it so desired, but it voluntarily chose not to do so. Under these circumstances, General's claim that the Board's taking official notice of the earlier decisions deprived it of a fair hearing is patently lacking in merit.

II. Substantial evidence on the record considered as a whole supports the Board's finding that petitioners violated Section 8(a)(1) of the Act by engaging in labor espionage

It is an elementary proposition of law that the utilization of undercover operatives by an employer to spy on the union activities of his employees is a

[15] The Court there found, in agreement with the Board, that Harvey and General "jointly operate an aluminum plant" in The Dalles, Oregon. 311 F. 2d at 571.

violation of Section 8(a)(1) of the Act.[16] Petitioners admit that Wallace was engaged to spy on the Harvey employees at the plant in The Dalles and Torrance. They contend, however, that Wallace operatives were employed only to detect theft and other illegal conduct. On the basis of the Trial Examiner's credibility resolutions and in agreement with his findings, the Board rejected petitioners' version of the facts, and chose to believe instead the version as testified to by the witnesses presented by counsel for the General Counsel.

Summarizing and discussing the conflicting evidence and the factors involved in resolving the issues of credibility would serve no useful purpose. As the Board observed, "the Trial Examiner engaged in exhaustive analysis in resolving these conflicts * * *" (R. 131). His analysis is contained in the Intermediate Report, and rather than repeat or paraphrase it here, we respectfully refer the Court to that document itself. Suffice it to say at this point that, applying the established standard of review, the findings of fact of the Trial Examiner and the Board clearly are entitled to acceptance by the Court on the basis of the record presented.[17]

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[16] *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240; *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 230; *N.L.R.B.* v. *Fruehauf Trailer Co.*, 301 U.S. 49; *N.L.R.B.* v. *Friedman-Harry Marx Clothing Co.*, 301 U.S. 58, 75.

[17] See, *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474; *N.L.R.B.* v. *Pittsburgh Steamship Co.*, 337 U.S. 656; *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404, 408; *N.L.R.B.* v. *U.S. Drivers Co.*, 308 F. 2d 899, 905 (C.A. 9), and cases cited therein; *N.L.R.B.* v. *Dinion Coil Co.*, 201 F. 2d 484 (C.A. 2); *Olson Rug Co.*, v. *N.L.R.B.*, 304 F. 2d 710, 715 (C.A. 7).

Apparently recognizing that there is no warrant for the Court to find credible those whom the Trial Examiner found to be incredible, and to disregard the testimony of those whom the Trial Examiner concluded merited belief, petitioners seek to prevail here by raising a number of alleged procedural errors committed by the Board which, they claim, prejudiced their case and entitles them to a judgment denying enforcement of the Board's order.

The principal contention of petitioners is that the Board's findings of fact rest on the testimony of three witnesses which should be stricken because petitioners were not given all the information and documents they were entitled to for purposes of their cross-examination. These witnesses, Calvin Davis, Stanley Hahn and Richard Moore, were Wallace operatives who testified regarding the nature and extent of their union espionage, and petitioners' involvement therein. In the following portion of this brief, we shall show that, contrary to their contentions, petitioners received all the documents which the Constitution, the Act, and the Board's own rules require that they be given in order properly to cross-examine Davis, Hahn and Moore. We show first, however, that even absent the testimony of these three witnesses, the Board's findings are supported by substantial evidence.

While the only direct evidence that Wallace operatives actually spied upon the Harvey employees' union activities is contained in the testimony of Davis, Hahn and Moore, the testimony presented by Wallace's sales

representative, Frank Siemens, his former wife, Mrs. Vernon Siemens, and Andrew Cronkrite, general manager of Harvey's plant at The Dalles, provide substantial independent suport for that finding. For it is established by the credited testimony of Mr. and Mrs. Siemens (summarized *supra,* pp. 3–4) that Wallace was hired by Cronkrite for the sole purpose of engaging in union espionage. The truth of the Siemens' testimony is confirmed by the inherent improbabilities in the testimony of General Manager Cronkrite, who testified that Wallace was retained only to uncover thefts and the disposition of stolen goods. For while the record establishes that thievery was rampant, Cronkrite admitted that no action was taken about the reports of thefts which were made (Tr. 2645–2651, 2724–2725). In his careful and detailed analysis of the testimony, the Trial Examiner pointed out that the various reasons assigned by Cronkrite for the employer's failure to act were plainly incredible (R. 164–171). Harvey was given names, dates and facts concerning the many thousands of dollars worth of equipment that were looted from the plant, and operative Stark several times offered to set up traps to catch the thieves in the act. Out of all this came one purported reprimand to a supervisor caught stealing, who thereafter engaged in at least two other reported thefts, but went unpunished (R. 168; Tr. 2650–2651). In short, the testimony of Cronkrite so defies belief as to justify the inference that the Wallace Detective Agency actually did what Mr. and Mrs. Siemens testified it was hired to do—i.e., spy on the

employees' union activities. Cf. *N.L.R.B.* v. *Dant & Russell,* 207 F. 2d 165, 167 (C.A. 9); *N.L.R.B.* v. *Griggs Equipment, Inc.,* 307 F. 2d 275, 278 (C.A. 5); *N.L.R.B.* v. *Bird Machine Co.,* 161 F. 2d 589, 592 (C.A. 1); *N.L.R.B.* v. *Brezner Tanning Co.,* 141 F. 2d 62, 64 (C.A. 1).

III. The Board did not commit prejudicial error in any of the procedural rulings of which petitioners complain

Even assuming *arguendo* that the Board's findings of fact can stand only if supported by the testimony of Davis, Hahn and Moore, we submit that those findings should be accepted by the Court because the Board properly denied petitioners' motions to strike the testimony in question. The motions to strike were based on the claim that they had not been supplied with all the documents they were entitled to as a matter of right for the purpose of seeing if there was anything contained therein which might be used to impeach the witnesses on cross-examination. As we shall now show, the arguments made by petitioners in support of their motions are totally lacking in merit.

A. The Board produced for petitioners' inspection and use all statements of the witnesses within its possession and control

Contrary to petitioners' charge that the Board has sought to "hide evidence" (Br., p. 57), the record shows that at the appropriate time during the hearing, counsel for the General Counsel turned over to petitioners upon their request copies of all statements in his possession or control. Petitioners' innuendo that counsel for the General Counsel was seeking to

deceive petitioners, the Trial Examiner, the Board and the Court by either destroying or returning statements taken by other agencies of the federal government to obstruct petitioners' access to them, is not only unsupported by the record, but is directly controverted by the sworn statements of Mr. Henderson in response to questions by both Mr. Lubersky and the Trial Examiner.

As shown in the Statement, *supra,* pp. 10–11–12, 16, Henderson stated under oath that petitioners had been given copies of all statements of the witnesses in the possession of the General Counsel, and that the General Counsel had never returned any statements to other agencies, or destroyed any statements obtained from other agencies (*supra,* pp. 10, 16). In other words, the General Counsel never had in his possession or control any statements given by Davis, Hahn and Moore other than the ones produced. Moreover, upon the direction of the Trial Examiner, Henderson searched his files for anything which might "approximate a statement" and came up with nothing except two file memos relating to conversations with Hahn and Moore (*supra,* pp. 11–12, 14). Both of these memos were given to the Trial Examiner so that he could determine whether they, or any part of them, constituted "statements" within the Supreme Court's definition of that term in *Campbell* v. *United States,* 365 U.S. 85. Henderson also took the stand and, over petitioners' objections, testified regarding notes which Moore testified he believed Henderson took during an oral interview (*supra,* pp.

14–15). This last incident is especially significant for two reasons: it is further evidence that Henderson and the Trial Examiner were not narrowly construing Section 102.118; and petitioners' attempt to prevent Henderson from testifying as to whether he had any notes of an interview with Moore shows that they were not really interested in obtaining this purported statement for possible impeachment purposes, but were more concerned with laying procedural traps so that they could subsequently claim that they were denied due process and thereby avoid an adverse determination regardless of the merits of the case against them. The demonstration of cooperation and fair play exhibited to petitioners by the Trial Examiner and counsel for the General Counsel, however, is a far cry from the bad faith and deceit with which petitioners seek to paint their actions.[18]

Petitioners also contend that Henderson admitted he had additional material subject to production upon demand when, in his petition to revoke the subpena

[18] Petitioners cannot seriously maintain that they were entitled to examine the General Counsel's files in order to confirm the truth of Henderson's testimony that everything which might be subject to production had been produced. The Supreme Court said in regard to the Jencks Act (18 U.S.C. 3500) that "the defense may [not] see statements in order to argue whether it should be allowed to see them" (*Palermo* v. *United States*, 360 U.S. 343, 354). That statement applies with equal logic here. "Surely the executive files of the Government are not to be invaded more easily and with less basis in a regulatory administrative proceeding of this sort than they would be in a criminal prosecution" (*Communist Party of U.S.* v. *S.A.C.B.*, 254 F. 2d 314, 325 (C.A.D.C.)).

duces tecum which had been served upon the General Counsel, he stated (Tr. Ex. Exh. 2–c):

> The documentary evidence required to be produced in response to the subpena is contained in regional office case files and other records within the control of the General Counsel. * * *

This argument assumes that everything sought by the subpena constituted "statements" within the meaning of the *Jencks* line of cases. However, the subpenas required the production of, *inter alia,* "notes, excerpts or summaries thereof and any summaries of other statements or other records of interviews and writings with respect to any such oral statements" of Davis, Hahn and Moore (Tr. Ex. Exh. 1–B). It is now well settled that unless they have been signed or otherwise adopted or approved by the witness, or are otherwise certain to constitute an accurate recital of what the witness said, such third-person notes, summaries, writings, etc., are not deemed "statements" and are not subject to production upon demand under *Jencks. Campbell* v. *United States,* 365 U.S. 85, 373 U.S. 487; *Palermo* v. *United States,* 360 U.S. 343, 349–351, 352–353, fn–11; *Ogden* v. *United States,* 303 F. 2d 724, 734–735 (C.A. 9); *United States* v. *Aviles,* 315 F. 2d 186, 191–192 (C.A. 2); *Communist Party of U.S.* v. *S.A.C.B.,* 254 F. 2d 314, 325 (C.A.D.C.). Thus, Henderson's representation in his petition to revoke that the evidence sought is under the control of the General Counsel could have referred merely to that material listed in the subpena which was not producible under *Jencks.* In view of Henderson's

sworn statements made both before and after the filing of the petition to revoke to the effect that everything even arguably subject to production had been produced, it is quite clear that that is all the petition referred to, and that it could not properly be construed to constitute an admission to the contrary.

Petitioners also contend that there was reasonable cause to believe that agents of the General Counsel had seen or been told the contents of the statements given by the witnesses to the other agencies, and therefore, the representatives of the General Counsel were duty bound to testify so that petitioners and the Trial Examiner could determine if that belief is correct. The only basis in the record for the contention that the statements had been made available to the General Counsel, however, is the unsupported accusation to that effect made by counsel for Harvey on June 14 while examining Henderson about the Board's files (*supra,* p. 11). Henderson's inability to respond to that accusation because of the prohibition imposed upon him by Section 102.118 of the Board's rules does not warrant an inference that the allegation has any basis in fact.[19] Unlike the situation in *N.L.R.B.* v. *Capitol Fish Co.,* 294 F. 2d 868, 870–871 (C.A. 5), counsel for Harvey neither adduced any testimony nor made an offer of proof to support his charge.

[19] In this connection, it is worthy of note that this charge was made by petitioners knowing that Henderson was barred from answering the loaded questions by Section 102.118. Lubersky had already plainly indicated that he was not interested in Henderson's answers, but that he just wanted to get his questions into the record (Tr. 119). Cf *N.L.R.B.* v. *General Armature & Mfg. Co.*, 192 F. 2d 316, 318 (C.A. 3), certiorari denied, 343 U.S. 957.

There was thus no showing of need (a requirement which petitioners in their brief, pp. 56–58, still accept as necessary), nor any other basis for finding that, as a matter of fundamental fairness to petitioners, Henderson's testimony on this point was required. Accordingly, the question of whether Henderson and Stratton could have or should have been compelled to testify despite the General Counsel's refusal to permit them to do so under Section 102.118 need not be considered.[20] Cf. *N.L.R.B.* v. *Vapor Blast Mfg. Co.,* 287 F. 2d 402, 407–408 (C.A. 7), cert. denied, 368 U.S. 823; *Raser Tanning Co.* v. *N.L.R.B.,* 276 F. 2d 80, 82 (C.A. 6), cert. denied, 363 U.S. 830; *N.L.R.B.* v. *Chambers Mfg. Corp.,* 278 F. 2d 715, 716 (C.A. 5); *N.L.R.B.* v. *Central Oklahoma Milk Producers Assn.,* 285 F. 2d 495, 498 (C.A. 10); *Biazevich* v. *Becker,* 161 F. Supp. 261, 265 (S.D. Cal.).

B. Under *Jencks*, petitioners do not have the right to obtain, for impeachment purposes, statements which have been made by the Board's witnesses to other federal agencies in connection with other statutes administered by them

In addition to the argument that the Board engaged in a willful scheme to have the benefit of the statements in the possession of other federal agencies while at the same time keeping them from petitioners, it is also contended that even if no employee or agent of

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[20] Contrary to petitioners' assertion (Br. p. 44), the Board has never contended in this proceeding "that it need not account for or seek the return of documents transported to other agencies. . . ." The Board does contend that the record clearly negates any impression petitioners seek to create in their brief that the Board ever had producible documents which were transported to other agencies.

the Board possessed, saw, or made use of the statements given by the three Board witnesses to the Department of Labor or the FBI, petitioners had a right, by virtue of the Supreme Court's decision in *Jencks* v. *United States,*[21] to inspect them upon demand for possible impeachment purposes during cross-examination in the unfair labor practice proceedings (Br. p. 40–41). This contention, however, is equally without merit.

In *Jencks,* the Court "exercis[ed its] power, in the absence of statutory provision, to prescribe procedures for the administration of justice in the federal courts * * * [and] decided that the defense in a federal criminal prosecution was entitled, under certain circumstances, to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses." *Palermo* v. *United States,* 360 U.S. 343, 345. The rule enunciated in *Jencks* was not a constitutional principle, and it was replaced as the controlling authority in criminal proceedings when Congress adopted the Jencks Act (71 Stat. 595, 18 U.S.C. Sec. 3500). *Palermo* v. *United States, supra,* 360 U.S. at 353–354, n. 11; cf. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 398–400.[22] The Second Circuit subsequently held, however, that the holding in *Jencks* applied to administrative proceedings as well, and the Board acqui-

[21] 353 U.S. 657.

[22] If any constitutional issues did underly the *Jencks* decision, they involved the Sixth, not the Fifth Amendment. *Palermo* v. *United States*, *supra*, 360 U.S. at 362–363 (concurring opinion).

esced in this determination. See *N.L.R.B.* v. *Adhesive Products Co.,* 258 F. 2d 403, 407–408; *Ra-Rich Mfg. Co.,* 121 NLRB 700. To implement this determination, the Board modified its rules prohibiting disclosure of the contents of its files in any judicial or administrative proceedings except upon the written consent of the Board or the General Counsel (29 C.F.R. Secs. 102.117(b), 102.118), and added the following proviso:

> After a witness called by the general counsel has testified in a hearing upon a complaint under section 10(c) of the act, the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken (Section 102.118).

Pointing to the fact that the proviso requires consent for the General Counsel to produce only those statements in *his* possession, petitioners contend that the regulation is unlawful since it is narrower than *Jencks,* which, they assert, applies to statements in the possession of any federal agency including those not involved or concerned with the particular criminal case. Even assuming *arguendo* that *Jencks* could reach as far as petitioners contend it does in criminal cases, their argument that the Board's rule should be as broad is frivolous on its face—the Board has absolutely no power to promulgate a regulation com-

pelling other federal agencies to open their files to the Board or to parties in litigation before the Board. In referring to statements "in possession of the general counsel," the Board went as far as it lawfully could go to effect compliance with *Jencks*.[23] Petitioners also contend that the proviso to Section 102.118 is unlawful because it narrows the scope of the term "statements" as used in *Jencks*. The fact is, however, that the Supreme Court nowhere defined "statements" in its decision, and while the Congressional definition in the Jencks Act is broader,[24] it cannot seriously be maintained that the Board is bound by a provision of the criminal code in proceedings which, under Section 10(c) of the Act, are governed "so far as practicable, * * * in accordance with the rules of evidence applicable in the district courts of

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[23] Indeed, the Board went even farther than did Congress in the Jencks Act, for the latter requires the Government to produce a statement only if it "was *made* * * * to an agent of the Government * * *" (18 U.S.C. Sec. 3500(a), emphasis added), whereas the Board's rule would apply regardless to whom the statement was made, just so long as it came into "*possession* of the general counsel" (emphasis added). Moreover, while both *Jencks* and the Jencks Act apply only to statements relating to the subject matter of the testimony, the Board's rule imposes no such restriction.

[24] In subsection (e) of 18 U.S.C. Sec. 3500, "statement" is defined as:

> (1) a written statement made by said witness and signed or otherwise adopted by him; or
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

the United States under the rules of civil procedure for the district courts * * *." The Board adapted the *Jencks* principle as best it could to the requirements of its proceedings; it need do no more.

Petitioners also contend that in any event, their right to the statements given to Labor and the FBI is not founded upon the Board's rules, but upon the fundamental grant of right contained in the *Jencks* decision itself, and that regardless of the Board's rules, if the witness's statements could not be obtained from the other Federal agencies, the witness's testimony should be stricken. As we have already shown, however, *Jencks* did not announce a constitutional due process requirement, but dealt only with a procedural matter in criminal trials. Hence, petitioners have no right under *Jencks* to statements made to other agencies in these Board proceedings because the Board's rule, not *Jencks,* controls. To hold that the Board must get the statements or lose the witnesses would leave the trial of Board cases at the mercy of the fortuitous coincidence of investigations conducted by this and other agencies—each concerned only with the administration of its own laws. Had the FBI or Department of Labor been aiding the Board in its investigation of the unfair labor practice charges, the Board would, of course, have been under a duty to produce the statements. But as we have shown, *supra,* p. 9, n. 4, such was not the case. As the Second Circuit said in *United States* v. *Grayson,* 166 F. 2d 863, 870, "* * * there is an obvious distinction between documents held by officials who are them-

selves charged with the administration of those laws for whose violation the accused has been indicted, and those which are not so held." Cf. *People* v. *Parham,* 384 P. 2d 1001, 1002–1003 (S. Ct., Cal.); *Commonwealth* v. *Smith,* 192 A. 2d 671, 672–673 (S. Ct., Pa.). See *St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 217.

Nor were petitioners prejudiced by the Board's failure to request the FBI and Department of Labor to give the Board copies of their statements so that petitioners might inspect them for possible impeachment purposes on cross-examination. Petitioners had obtained subpenas *duces tecum* from the Trial Examiner directed to the Attorney General and Secretary of Labor on June 14, the first day of Davis' cross-examination; a request by the Board for the same material could have added nothing to the request embodied in the subpenas. Moreover, contrary to the assertion of petitioners in their brief, pp. 45–46, the Board's failure to ask the other agencies to give it copies of the statements is not inconsistent with its practice in other cases. In *Tomlinson of High Point, Inc.,* 74 NLRB 681, the Board asked the Secretary of Labor if he would comply with a subpena (if one were issued and served) and produce documents which would have been admissible to prove the truth of what was contained therein. Here, in contrast, the statements sought by petitioners could only have been used to show, perhaps, that the Board's witnesses were not credible because they had changed their stories. Cf. *N.L.R.B.* v. *Local 160, Hod Carriers,* 268 F. 2d 185, 186 (C.A. 7); *N.L.R.B.* v. *Quest-Shon Mark Brassiere*

Co., 185 F. 2d 285, 289 (C.A. 2), cert. denied, 342 U.S. 812. In *Carpenters Local Union #224, etc. (Peter Kiewit Sons Co.)*, 132 NLRB 295, the Board did not, as petitioners claim, reverse the Trial Examiner's finding of a violation on the ground that he had improperly credited a state employee who would not produce certain confidential state files for purposes of cross-examination. Rather, the Board affirmed the Trial Examiner's refusal to credit the contradicted testimony of a former state employee because the state documents which would have settled the issue were denied to the Trial Examiner by a state official as being confidential and privileged under state law. Again, the material which the other governmental agency refused to disclose would have been admissible to prove the truth of its contents, and did not constitute, as here, merely another possible means of attacking the credibility of the witness.

In sum, the Board produced for petitioners' inspection and use all statements of the witnesses to which petitioners were entitled as a matter of right under the Board's rules, and its failure to produce or seek the statements given to the FBI and Department of Labor did not constitute a denial of due process.

C. The Board did not commit prejudicial error in revoking the subpenas directed to the General Counsel, the Attorney General, and the Secretary of Labor

As shown in the statement, *supra,* pp. 10–11, when counsel for the General Counsel failed to satisfy petitioners' demand that he give them all the documents they contended they were entitled to under their interpretation of *Jencks,* petitioners sought to accomplish the same objective by obtaining from the Trial Ex-

aminer subpenas *duces tecum* for those documents and directed at the General Counsel, the Attorney General, and the Secretary of Labor. On the petitions of the three officials, the Trial Examiner subsequently revoked the subpenas. We submit, contrary to petitioners, that the Trial Examiner had the power to revoke the subpenas and that he properly did so.

Section 11(1) of the Act provides: "The Board, or any member thereof, shall upon application of any party * * * forthwith issue to such party subpenas requiring * * * the production of any evidence * * *. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to * * * any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required." The Board's rule implementing this provision of the Act provides, *inter alia,* that "the trial examiner or the Board, as the case may be, shall revoke the subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpena is otherwise invalid" (29 C.F.R. Sec. 102.31(b)).

Relying on *N.L.R.B.* v. *Cashman Auto Co.*, 223 F. 2d 832 (C.A. 1), petitioners contend that the Trial Examiner could revoke the subpenas only if they came within the two conditions set forth in the text of the Act, i.e., if the evidence sought is irrelevant to the matter involved, or if the subpena "does not describe with sufficient particularity the evidence whose production is required." But if petitioners actually accept *Cashman Auto* as controlling, then they are barred from complaining to this Court about the Board's failure to enforce the subpenas, for the court there went on to hold that since the Trial Examiner was without power to revoke the subpena for the reasons asserted, the revocation was a nullity and the respondent, on whose behalf the subpena was issued, should have asked the General Counsel to institute enforcement proceedings under Section 11(2) in the appropriate district court. Its failure to make such a request at the appropriate time precluded it from complaining later that the failure to enforce was prejudicial. In the case at bar, the record is barren of any request by petitioners that the General Counsel seek judicial enforcement of the subpenas.[25]

While petitioners' failure to act would be fatal to their position under *Cashman Auto,* we do not rely on that as a basis for rejecting petitioners' claim, because we believe that, with all due respect to the

[25] In their brief, p. 68, n. 72, petitioners seek to distinguish that case from this on the ground that in *Cashman Auto*, no petition to revoke had been filed by the party subpenaed. That distinction is of no consequence, however, because the First Circuit did not decide the case on that basis.

First Circuit, it erred in holding that the Trial Examiner was without power to revoke subpenas for reasons other than the two enumerated in Section 11(1). While there is no legislative history on the point, we submit that the two grounds for revocation set forth in Section 11(1) were meant to be illustrative only, and that Congress could not have intended to deprive the Board, as the issuing authority, power to revoke subpenas for any other reason equally sufficient in law. To hold otherwise would impose an impossible burden on the federal courts, for it would mean that only the courts could pass upon petitions to revoke based upon the allegation that production as demanded in the subpena would be burdensome and oppressive; or because the party subpenaed did not have the evidence described; or because the subpena was not properly served; or for any number of similar reasons which the Board, the Regional Directors and the Trial Examiners are faced with daily in literally scores of representation and unfair labor cases. Under the scheme of the Act, Congress clearly intended that such interlocutory rulings as the revocation of subpenas for any reason be handled by the Board alone, subject to review for prejudicial error in the courts of appeals under Section 10 (e) and (f) of the Act, *N.L.R.B.* v. *Steel, Metals, Alloys, etc., Local 810, Teamsters,* 253 F. 2d 832 (C.A. 2); *N.L.R.B.* v. *Blackstone Mfg. Co.,* 123 F. 2d 633 (C.A. 2); *N.L.R.B.* v. *Vapor Blast Mfg. Co.,* 287 F. 2d 402; 407–408 (C.A. 7), cert denied, 368 U.S. 823; *N.L.R.B.* v. *Thayer,* 213

F. 2d 748, 757–759 (C.A. 1), cert. denied, 348 U.S. 883; *N.L.R.B.* v. *Jamestown Sterling,* 211 F. 2d 725, 726 (C.A. 2); *N.L.R.B.* v. *Quest-Shon Mark Brassiere Co.,* 185 F. 2d 285 (C.A. 2), cert. denied, 342 U.S. 812; *New Britain Machine Co.,* 105 NLRB 646, n. 2, enforced, 210 F. 2d 61 (C.A. 2).

Having thus shown that the Trial Examiner had the power to revoke the subpenas issued in this case for any legally sufficient reason, we turn now to the issue of whether the revocations were proper. It is axiomatic that a subpena *duces tecum* is not in itself a grant of right to the production of documents, but is merely a means to obtain material to which the party causing the subpena to be issued is otherwise entitled. In the instant proceeding, petitioners base their claim of right on *Jencks,* contending they are entitled to see any document relating to any statement made by the witness to any government agency bearing on the subject matter of his testimony, because of the possibility that there might be something contained therein which might be inconsistent with what he has testified to on direct examination, thereby providing an opportunity to attack his credibility. If *Jencks* does apply, however, then the subpenas are not necessary, for the *Jencks* rule has its own built-in mechanism of compulsion—if the documents are not produced, the testimony of the witness shall be stricken. But as we have already shown, *Jencks* does not apply to Board proceedings except insofar as its precept has been incorporated in the proviso to Section 102.118. Therefore, if the Board

has properly limited discovery in this respect to defined statements in its possession, petitioners cannot circumvent this restriction by the service of subpenas *duces tecum.*

The propriety of the Trial Examiner's order of revocation is further supported by the fact that all three agencies—the Board, the Department of Justice and the Department of Labor—have regulations prohibiting the disclosure of the contents of their files except with the permission of the agency. 29 C.F.R. Sections 2.9, 102.117(b) and 102.118; Attorney General Order No. 3229, 18 Fed. Reg. 1368 (1953). It is settled law that these regulations are valid exercises of the executive power (*Touhy* v. *Ragen,* 340 U.S. 462; *Boske* v. *Comingore,* 177 U.S. 459), at least insofar as they place upon the party seeking the material the burden of demonstrating the need therefor so that the court can strike a balance between the conflicting claims. *United States* v. *Reynolds,* 345 U.S. 1; *Machin v. Zuckert,* 316 F. 2d 336 (C.A.D.C.); *Starr* v. *Commissioner of Internal Revenue,* 226 F. 2d 721, 723–724 (C.A. 7); *Madden* v. *Hod Carriers, etc., Local No. 41,* 277 F. 2d 688 (C.A. 7), cert. denied, 364 U.S. 863; *Kaiser Aluminum Co.* v. *United States,* 157 F. Supp. 939, 942 (Ct. Cl.). Cf. Rule 34, Federal Rules of Civil Procedure. Petitioners have made no such showing here, except to claim that they are entitled to the material as a matter of right. But where, as here, *Jencks* does not apply, such a claim is not enough; there must be a "showing of 'good

cause' * * *'' *N.L.R.B.* v. *Jamestown Sterling Corp.*, 211 F. 2d 725, 726 (C.A. 2), and cases cited therein.[25a]

Petitioners cannot successfully claim that they were hampered in their cross-examination of Davis, Hahn and Moore by the Trial Examiner's ruling; they had the affidavits the witnesses had given to petitioners as well as the Board, and the record is replete with petitioners' many allegedly successful attempts to destroy the witnesses' credibility. Hence, even if the Trial Examiner committed some error in disposing of the petitions to revoke, it was harmless.

D. The Board did not commit prejudicial error by refusing to produce the Hahn memorandum for petitioners' inspection

At the hearing, after petitioners had been given a copy of the statement given by Hahn to Board agent Stratton for purposes of cross-examination, petitioners also demanded that they be given a ''memorandum to file'' made by Stratton of a conversation he had with Hahn, but which Hahn had never seen. While counsel for the General Counsel, relying on Section 102.118 of the Board's rules, refused to permit petitioners to see it, he did show the memorandum to the Trial Examiner *in camera* so that the latter

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[25a] *United States* v. *Grayson*, 166 F. 2d 863 (C.A. 2); and *Bank Line* v. *United States*, 76 F. Supp. 801 (S.D. N.Y.), relied on by petitioners in their brief, are not to the contrary. Neither case involved an attempt to get a witness's statement because it might contain contradictions to his testimony, which is the sole basis asserted by petitioners here. In both cases, the party seeking the material had made a preliminary showing that the material was necessary because it contained evidence bearing directly on the merits of the case.

could rule on whether it was producible. Upon examination of the document, the Trial Examiner described it as being less than a page in length, and containing Stratton's comments and impressions of the conversation along with "purported quotes of what the witness said * * * specifically two two-word phrases" comprising not more than 10 percent of the memorandum (Tr. 333, 351). Pursuant to petitioners' suggestion, the Trial Examiner compared the memorandum with Hahn's affidavit which had already been given petitioners for the purpose of determining whether it added to or differed with the adffidavit in any way. After comparison, the Trial Examiner noted that in his opinion, Stratton's notes would not give petitioners anything they did not have already in the affidavit. Accordingly, the Trial Examiner ruled that the document was not producible under the proviso to Section 102.118, stating that there was not "an iota of evidence that the statement Mr. Stratton wrote for file was anything other than impressions" (Tr. 352–353).

Relying on *Campbell* v. *United States,* 373 U.S. 487, petitioners contend that they were "entitled to see at least part and perhaps all of the document to assist them in cross-examining the witness" (Br. p. 78). Nothing in *Campbell,* however, supports petitioners' claim, for there it was shown that the document in question was an "Interview Report" of what the witness had told an FBI agent, based upon notes which the agent had read back to the witness and which the witness had approved. The district court

had found "that the Interview Report recorded [the witness's] statement 'almost *in ipsissima verba.*'" 373 U.S. at 495, n. 10. Here, on the other hand, the memorandum consisted almost entirely of the Board agent's comments and impressions, with only two purported quotes of the witness. The two situations, therefore, are hardly comparable. Cf. *Palermo* v. *United States,* 360 U.S. 343, 352–353. The memorandum involved here is obviously the type of inter-office communication which is unquestionably privileged against disclosure. *Appeal of SEC,* 226 F. 2d 501 (C.A. 6).

Moreover, even if all but "two, two-word quotes" should have been cut out of the document so that it could be given to petitioners, the Trial Examiner's failure to do so does not constitute prejudicial error, for he found that the memorandum added nothing to what was contained in the affidavit which was given to them. *Rosenberg* v. *United States,* 360 U.S. 367, 370–371; *Ogden* v. *United States,* 303 F. 2d 724, 739–741 (C.A. 9).

IV. The Board properly denied petitioners' application for the deposition of Lee Caldwell

Petitioners' contention (Br. 78–81) that the Trial Examiner erred in denying their application for the deposition of Lee Caldwell during an approaching recess is plainly without merit. This Court has flatly stated that "There is no provision in the Act authorizing the use of the discovery procedure." *N.L.R.B.* v. *Globe Wireless,* 193 F. 2d 748, 751 (C.A. 9). Even assuming *arguendo* the existence of such rights, the

denial here was a proper exercise of the Trial Examiner's discretion.[26]

Discovery not being a central part in administrative hearings as it is in federal courts, the Trial Examiner found no reason to depart from the usual procedure of allowing cross-examinations only. In essence, the only "good cause" shown by petitioners for requesting the extraordinary privilege of taking a deposition in a case such as this was that the testimony of the Board's witnesses was "sharply disputed" (Br. 80) by petitioners' witnesses. We submit that this is not an uncommon situation in any litigation. Moreover, petitioners' characterization of the Board's witness as "perjurers and alcoholics" (Br. p. 80) implies only that Caldwell's testimony after the recess would be different from what it would be if there were no recess—an implication, we submit, not worthy of reply.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that substantial evidence supports the Board's findings, and that the Board did not commit errors which prejudiced petitioners' right to a fair hearing. Accordingly, a decree should be entered enforcing

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[26] Section 102.30 of the Board's Rules and Regulations provide in relevant part that "Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition. (a) The * * * Trial Examiner * * * shall * * * if in his discretion good cause has been shown, make and serve upon the parties an order which will specify the name of the witness where deposition is to be taken * * *."

the Board's order in full. If the Court should be of the opinion, however, that it was prejudicial error to refuse to allow petitioners to inspect, for purposes of cross-examination, some of the documents denied them, we urge that the Court remand the case to the Board for further action consistent with its decision, and not, as petitioners demand, simply deny enforcement and terminate the case. Petitioners recognize (Br. p. 109–110) that the appropriate course would be to remand the case to the Board, but contend that the penalty of dismissal announced by the Supreme Court in *Jencks* should apply, because "the Government's conduct was willful and deliberately designed to deny petitioners their rights" (Br. p. 110). Contrary to petitioners' claim, however, the record shows that the Board made every effort to accord petitioners every right to which all parties appearing before it are entitled. If the Board erroneously denied them some documents to which they were entitled, it did not do so maliciously, and the Board should not be treated as if it had. If error was committed here, it was no more willful than in the many cases following *Jencks,* which have been remanded by the appellate courts so that the trial courts could correct whatever errors had been found. We respectfully submit that, if necessary, the same course should be taken here. Petitioners' conduct as found by the Board in this and other cases in which petitioners have been involved, "discloses a clear cut purpose

to thwart the most basic guarantees of Section 7 of the Act" (R. 210). It should not go unremedied.

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DECEMBER 1963.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX

I

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 * * * (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, * * * shall have power to issue and cause to be served upon such person a complaint stating

the charges in that respect, and containing a notice of hearing before the Board * * *, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint * * *. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723–B, 723–C).

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II

The relevant provisions of the Board's Rules and Regulations Series 8, as amended (29 C.F.R., Subtitle B, Chapter I), are as follows:

Sec. 102.117 *Files, records, etc., in exclusive custody of Board and not subject to inspection; formal documents and final opinions and orders subject to inspection.* * * * (b) * * * Subject to the provisions of sections 102.31 and 102.66, all files, documents, reports, memoranda, and records pertaining to the internal management of the Board or to the investigation or disposition of charges or petitions during the nonpublic investigative stages of proceedings and before the institution of formal proceedings, and all matters of evidence obtained by the Board or any of its agents in the course of investigation, which have not been offered in evidence at a hearing before a trial examiner or hearing officer or have not been made part of an official record by stipulation, whether in the regional offices of the Board or in its principal office in the District of Columbia, are for good cause found by the Board held confidential and are not matters of official record or available to public inspection, unless permitted by the Board, its chairman, the general counsel, or any regional director.

III

The relevant provisions of the rules and regulations of the Department of Labor (29 C.F.R., Subtitle A), are as follows:

> Sec. 2.9 **Withdrawal of originals and copies from Departmental Records.** (a) *Originals.* No account, letter, record, file, or other document or paper in the custody of the Department, or of any bureau, office or officer thereof, shall on any occasion be taken or withdrawn by any agent, attorney, or other person not officially connected with the Department; no exception will be made without the written consent of the Secretary or his duly auhorized representative.
>
> (b) *Copies.* Copies of accounts, letters, records, files and other documents or papers shall not be furnished to any person except with the written consent of the Secretary or his duly authorized representative. Such written consent will be granted only to such persons as may have a personal material interest in the subject matter of the papers or at their request. Applications for copies of documents, accounts, records or files should be made to the Secretary and should be accompanied by an affidavit setting forth the interest of the applicant and showing the reason why and the purpose for which the copies are desired. Except where requests are made by the Attorney General under section 188 of the Revised Statutes (5 U.S.C. 91, 1952 ed.) for evidence touching the claims of persons suing the United States in the Court of Claims, copies of accounts, letters, documents, records, or other papers desired by or on behalf of parties to causes pending in any court shall be furnished only to the court on an order or a rule of the court requesting the Secretary to furnish the same, and then only when the production of such copies will not, in the judgment of the Secretary or his duly

authorized representative, be prejudicial to the Government or the public interest. No exception will be made without the written consent of the Secretary or his duly authorized representative.

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